jurisdiction of the so-called equitable tort of waste on the theory that the law ought to have allowed a remedy therefor,[7] so, conversely, where the defendant threatens repeated trespass which would cause a purely technical or nominal injury to the plaintiff equity will refuse an injunction on the theory that the law should not have granted a remedy in the first instance.[8] But the very definition of nuisance postulates an injury which shall be substantial.[9] Therefore it would seem that equity cannot rightfully refuse to exercise concurrent jurisdiction. Upon this question, however, the cases are in conflict. The weight of English authority and some of the courts in this country insist that the injunction must issue as a matter of right.[10] Others, representing the modern trend, agree with a recent decision in refusing an injunction where the injury to the defendant by its issue would greatly outweigh the injury to the plaintiff by its refusal. *Bliss* v. *Anaconda Copper Mining Co.*, 167 Fed. 342 (Circ. Ct., D. Mont.). Doubtless otherwise the plaintiff may be enabled to charge an exorbitant price for his property. That, however, is one of the legitimate incidents of ownership;[11] but the same cannot be said for the private right of eminent domain which the defendant would in effect acquire upon a denial of the injunction.[12]

Although this doctrine of the "balance of convenience" is not to be justified upon strict principle, its persistence in this country and not in England may possibly be explained by the fact that the American courts, unlike the English, are not only denied the reassuring thought that the legislature is at liberty to take a higher view of the relative rights of the parties and condemn private property for private use,[13] but are also, as a general thing, refused statutory authorization to give damages in lieu of an injunction.[14]

THE RUNNING OF THE BURDENS OF COVENANTS AT LAW AND IN EQUITY. — In England the burden of covenants runs with the land at law only in the case of leases.[1] In this country a broader view has been taken, and it is generally held that the burden will always run at law, provided,

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[7] See Short *v.* Piper, 4 Harr. (Del.) 181.

[8] See Behrens *v.* Richards, [1905] 2 Ch. 614. Of course, if the law allowed no action for such trespass, no prescriptive right could be acquired. As it is, the plaintiff need only bring action often enough to defeat the presumption of a lost grant; and this, apparently, was not considered hardship enough, in the case cited, to compel equitable relief.

[9] St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 642.

[10] Hennessy *v.* Cormony, 50 N. J. E. 616.

[11] Cowper *v.* Laidler, [1903], 2 Ch. 337.

[12] Where the defendant is a public service corporation, the argument for granting the injunction is even stronger, for such corporations are allowed a statutory method of condemning private property. Village of Dwight *v.* Hayes, 150 Ill. 273.

[13] *Cf.* Goodson *v.* Richardson, L. R. 9 Ch. App. 221.

[14] But the English courts of equity will not avail themselves of this privilege, where irreparable damage is threatened. Swaine *v.* Great Northern Ry. Co., 4 DeG., J. & S. 211. Without such statutory authorization the New York courts have assumed a like power by granting an alternative decree. Sperb *v.* Metropolitan Elevated R. Co., 137 N. Y. 155. Such a course would be anomalous in the case of a private corporation; but when applied, as is done, exclusively in cases of public service corporations, the result is fantastic.

[1] Haywood *v.* Building Soc., 8 Q. B. D. 403; Austerberry *v.* Oldham, 29 Ch. D. 750.

first, that there is privity of estate, and, second, that the covenant concerns the user or affects the enjoyment or the value of the land.[2] The great difficulty in the subject lies in the definition of privity of estate. Generally, however, the American law finds no privity unless the covenant accompanies a grant.[3] This fulfills the obvious purpose of both requirements, to avoid the attachment to the land of mere personal covenants by excluding the covenants of strangers. In a recent Indiana case a covenant to repair a crossing was made on the assertion of a franchise right from the legislature to cross the covenantee's right of way. Although there was no actual grant by the covenantee, yet, since the necessity of one was avoided by the legislature and since the covenant was made on the first assertion of the legislative authority which dispensed with the necessity of the grant, it is difficult to agree with the court that there was no privity of estate. *Evansville, etc., Co.* v. *Evansville Belt Ry. Co.*, 87 N. E. 21.

In the United States the burden of all covenants that run at law will also run in equity, if the nature of the covenant allows, under the ordinary rules of specific performance.[4] In England, where no burdens but those in leases run at law, equity steps in, but confines its relief to restrictive covenants.[5] The ground of equity jurisdiction in such cases has been said to be the prevention of unjust enrichment: the successor of the covenantor by buying land subject to a burden buys at a lower price, and if he holds the land after purchase free from the burden, he is enriched by the enhancement in its value.[6] A difficulty arises, however, in supposing that a covenantor properly advised as to the running of the covenant after his transfer would sell for the value with burden affixed. In other words, the theory presupposes its conclusion that the covenant will run. It is submitted that the jurisdiction of equity rests really on the old principle of the inadequacy of the legal remedy: equity thought the covenants should run as a matter of fairness and therefore enforced them by the application of the ordinary rules of specific performance in charging the consciences of successors taking with notice.

But on any theory of equitable jurisdiction it is difficult to see why there should be any distinction taken between negative and affirmative covenants; and the tendency of American courts is against such a distinction.[7] The unjust enrichment exists whether the burden be affirmative or negative. That the expenditure of money by the covenantor's assign in specific performance may be unprofitable is a possible reason for non-enforcement on account of hardship or unfairness, but should not in itself prevent the existence of the right. Also it is well recognized in both England and America that equity will in many circumstances specifically enforce affirmative action

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[2] Gilmer *v.* Mobile, etc., Co., 79 Ala. 569, 572; Bronson *v.* Coffin, 108 Mass. 175.

[3] Sims, Covenants, 197. *Cf.* Barringer *v.* Va. Trust Co., 132 N. C. 409. It is as yet undecided whether there is privity of estate where the grantor parts with all his land and it is impossible to construe the covenant as the retention of an easement or profit. The nearest cases are covenants which are contained in grants of easements, when the covenants are allowed to run. Should such covenants not run, a third requirement would be added, that the covenant support some interest retained by the grantor.

[4] Sims, Covenants, 255.

[5] Haywood *v.* Building Soc., *supra.*

[6] 17 HARV. L. REV. 176; 18 *ibid.* 214.

[7] See cases cited in 17 HARV. L. REV. 176, n. 3; Farmers', etc., Co. *v.* N. H. Co., 40 Colo. 467, 478; Flege *v.* Covington, etc., Co., 122 Ky. 348; Atlanta Ry. Co. *v.* McKinney, 124 Ga. 929.

where the performance required is not of too complicated a nature. Accordingly this hard and fast distinction between affirmative and negative covenants seems anomalous.

CONCURRENT JURISDICTION OF STATES OVER BOUNDARY WATERS.— Where a body of water is the boundary between two nations or states, there may arise many nice questions of jurisdiction because of the necessity to determine the exact place of occurrence of an act committed thereon. Especially difficult are these questions when, as is so often the case in this country, the boundary line is the main channel of a navigable river. The colonies regulated this situation by agreeing that each state should possess concurrent jurisdiction over the boundary river.[1] This solution was adopted at the formation of the Union and incorporated by Congress in the enabling acts of new states whose boundaries presented the problem.[2] By this grant of concurrent jurisdiction each state extends its jurisdiction into the territory of the other state, which at the same time retains its own jurisdiction. Jurisdiction is power to apply law to the acts of men,[3] and by the common law is determined territorially. Logically, a state may extend its jurisdiction over acts committed beyond its territory, or, retaining its territorial sovereignty, grant jurisdiction over acts within its territory.[4] But the combination of these possibilities is not free from difficulty. There are four possible conditions and interpretations of this concurrent jurisdiction: (1) That before jurisdiction is exercised both states must agree; (2) that one state can exercise jurisdiction within the other's territory so long as the other has not acted adversely; (3) that conflicting legislative enactments may exist, but the first state obtaining actual custody over the party or parties in question shall defeat the right of the other state to exercise its powers;[5] (4) that a conflict of legislative, executive, or judicial decrees must be settled, if at all, by agreement between the conflicting jurisdictions after jurisdiction has been exercised.

The Supreme Court, having recognized the possibility of concurrent jurisdiction,[6] had in a recent case to consider its scope. The boundary between Washington and Oregon is the main channel of the Columbia River, and an act of Congress gave the two states concurrent jurisdiction

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[1] See Handly's Lessee *v.* Anthony, 5 Wheat. (U. S.) 374. Another form of agreement was the restricted concurrent jurisdiction maintained between Pennsylvania and New Jersey. See Commonwealth *v.* Frazer, 2 Phila. 191; Attorney-General *v.* Delaware & Bound Brook R. R. Co., 27 N. J. Eq. 1.

[2] This solution was generally adopted. See State of Missouri *v.* Metcalf, 65 Mo. App. 681; Wiggens Ferry Co. *v.* Reddig, 24 Ill. App. 261. New York and New Jersey made an agreement without action by Congress, the constitutionality of which may be questioned. See People *v.* Central R. R. Co. of New Jersey, 42 N. Y. 283.

[3] See Wedding *v.* Meyler, 192 U. S. 573, 584. The distinction between jurisdiction and sovereignty is brought out by the fact that in no case has one state been allowed to tax the property of the other on or over the river. Dunlieth & Dubuque Bridge Co. *v.* County of Dubuque, 55 Ia. 558; Keokuk & Hamilton Bridge Co. *v.* People, 145 Ill. 596; Hamilton Bridge Co. *v.* Henderson City, 173 U. S. 592.

[4] Holland, Jurisprudence, 9 ed., chap. XVIII.

[5] This was the agreement between Pennsylvania and New Jersey. Commonwealth *v.* Shaw, 8 Pa. Dist. Rep. 509.

[6] Wedding *v.* Meyler, *supra*. Other courts have enforced this jurisdiction without considering its scope. State *v.* Plants, 25 W. Va 119: Swearingen & Coriel *v.* Steamboat Lynx, 13 Mo. 519.